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No. 253

IN THE

Supreme Court of the United States

October Term, 1948

253

THE UNITED STATES, *Petitioner*

vs.

PENN FOUNDRY AND MANUFACTURING COMPANY, *Respondent.*

RESPONDENT'S PETITION FOR REHEARING OR FOR MODIFICATION OF JUDGMENT REMANDING CASE TO COURT OF CLAIMS FOR ADDITIONAL FINDINGS.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

For the reasons set out below, respondent respectfully petitions the Court for a rehearing in this cause or for a modification of the Court's judgment of May 31, 1949 so as to remand the case to the Court of Claims for additional findings, consistent with the issues raised by the majority and concurring opinions of this Court.

THE OPINIONS HEREIN

This was an action by respondent against the United States for loss of anticipated profits alleged to have been caused by the latter's cancellation of a contract made on February 23, 1942 for the production of naval gun mounts.

The majority opinion of this Court was predicated on the conclusion that the findings of fact made by the Court of Claims were not sufficient to sustain its judgment for respondent because of (1) the absence of findings showing the readiness and capacity of the respondent to perform certain of its contractual obligations upon which its profits were contingent and (2) the presence of certain affirmative findings which precluded the drawing of any sufficient inference of such readiness and capacity from other findings. The Court reversed the Court of Claims and remanded the cause with a direction to enter judgment in favor of the United States. *Mr. Justice Reed* and *Mr. Justice Jackson* concurred in reasoning of the majority for reversal, but would not have judgment entered for the United States because, in their opinion, respondent should have an opportunity upon remand to meet the stated requirements of proof.

The four concurring justices, in an opinion written by *Mr. Justice Douglas*, agreed to the form of judgment advanced by the majority but upon the ground that respondent had not carried the burden of showing that during the period in question, there was no mandatory policy of the Navy to require a cancellation clause in its contracts, or that respondents would, for one reason or another, have been saved from the application of that policy.

The burden of this petition is (1) that the reasoning of both the majority and concurring opinions are rebutted both by the record below and war contract experience, and (2) that in any event, as pointed out by the dissenting Jus-

tices, respondent should have the opportunity upon remand, in accordance with the historic practice of this Court, to have further findings made to supply the alleged omissions found by the majority and concurring opinions because those omissions were not occasioned by any failure of proof on respondent's part but were, rather, the result of deficiencies in the judgment and findings of the Court below and/or the failure of the Government to raise an issue in the court below upon which the court below could rule.

I.

THE EVIDENCE BEFORE THE COURT OF CLAIMS IS SUFFICIENT TO SUSTAIN ITS ULTIMATE FINDINGS AND JUDGMENT AND TO SUPPORT ADDITIONAL EVIDENTIARY FINDINGS REQUIRED BY THE MAJORITY OPINION.

Respondent requested the Court of Claims to make evidentiary findings to support the ultimate finding (No. 8) to the effect that

> "If the plaintiff (respondent) had been permitted to perform its contract, it would have made a net profit of not less than $80,000" (R. 21)

Those requests, set out below, were fully supported by detailed references to the transcript of evidence in the Court of Claims and were at no time answered or rebutted.[1]

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[1] Defendant below failed in its "Motion for a New Trial and Brief" to give even one reference to the transcript of evidence in support of the Commissioner's Report, and in opposition to the Court's Findings, as required by Rule 93 of the Court of Claims which requires that,

> "A motion founded upon an error of fact shall specify with minuteness the fact or facts which are regarded as erroneously found or erroneously omitted to be found by the Court, *with full reference to the evidence which is relied upon to support the motion*."

When the government filed its petition for certiorari, it failed to include in the Record the parts of the record below material to the errors

Abstract of Plaintiff's Requested Findings of Fact in Court of Claims:

1. Information as to the sources of supplies and sub-contractors were furnished it by the Gun Mount Section. (R. 44, below, Tr. 787-788).

2. Plaintiff's facilities and the amount of sub-contracting it had arranged to use, as shown by the Navy inspections, were such that the gun mounts called for by the contract could have been produced by plaintiff in accordance with plaintiff's proposal which was accepted. (R. 41, below, Tr. 155, 177, 174, 197, 138, 140, Plf's Exs. 14 and 19).

3. As requested by the Navy plaintiff registered with and was accepted by the Department of State as an Arms Manufacturer. (Id. R. 41, Tr. 38, 39).

4. Plaintiff had more equipment than was required to perform the contract to build the gun mounts. (R. 42, Tr. 5, 8, 69, 70, 203, 204).

5. If any additional machinery was necessary it could have been obtained by plaintiff. Financial arrangements had been made with the Federal Reserve Bank in Richmond, Va., if additional financing became necessary (R. 48, Tr. 221, Plf's Ex. 19).

6. Plaintiff furnished the Navy with copies of arrangements with sub-contractors relating to the work to be sublet after negotiations had been conducted with them. (R. 48, Tr. 149, 187, 199, Plf's Ex. 13).

7. Plaintiff's Chief Engineer, Mr. Kennedy, was to handle the manufacture of the gun mounts, and was considered

---

assigned. Although respondent had the right to request such parts of the record as supported ultimate finding No. 8, it did not do so, because it believed that under 28 U. S. C. § 288 (b), it was petitioner's duty to request that the record include parts of the transcript of evidence to support its alleged errors assigned, and if such request had been made, then respondent would have requested additional parts of the transcript of evidence to support the lower court's ultimate finding.

by the Navy officials to be very able, and well qualified to perform the task. (R. 49, Tr. 129, 132, 384, 759-760, 780). He prepared specifications based on the Navy's blueprints, tool and die design (R. 49, 136, 137). There was an adequate labor supply of both skilled and unskilled labor immediately available in plaintiff's area and the contract to plaintiff was of general local interest (R. 49, Tr. 166, 172, 173, 177, 186, 241).

8. Based upon costs and engineering, engineering manufacturing estimates computed from a study of machine tool operations and sub-contract prices, it appeared that if plaintiff had been permitted to perform the contract its profit would have amounted to 25% of the contract price of $2,087,000 or a gross profit of $500,000 (R. 54, Tr. 146 (Kennedy) 148, 149, 198, Plf's Ex. 12) and this sum was subject to reduction by certain costs and overhead expense items which would result in a net profit to the plaintiff of approximately 8% to 10% of the contract price, or a net profit of $167,000 to $208,000. (Id.) (Tr. 150-151)

In addition to the findings requested by respondent in the Court of Claims, respondent would have had additional protection under the then existing policy for all Navy contractors, of no expense for a bond, no liquidated damage clause, and the usual escalator clause if a formal contract had been executed. (See reference to record in Pownall v. U. S., 334 U. S. 742, R. 178, 179).

Respondent and its Counsel are deeply and sincerely convinced that if this cause is remanded, with instructions to the Court of Claims to review the testimony and, if deemed necessary, to take further testimony where deficiencies of proof exist, if any, that it will, of necessity, based upon such review, make additional findings which will fully meet the objections raised both in the majority opinion of the Court and in the concurring opinion.

But if the Court of Claims should fail, upon remand, to make additional or clarifying findings satisfactory to this

Court, all parties would have the satisfaction that full justice has been done upon a complete record and in conformity with the views of this Court.

This course could not, in any way, prejudice the rights of either party.

Respondent submits that further exploration of the record below and a remand for further evidentiary findings will clarify other objections found by this Court to the findings.

For example, objections to the Court of Claims' statement in its opinion that respondent would have received the same consideration and tolerance that the Government showed other war contractors would be eliminated because this observation although supported by the uniform experience of World War I contractors (see affidavit of H. S. Hensel at pp. 12, 13, *infra*,) was not required to support finding No. 8 and the judgment below in view of the ample evidence in the transcript below that respondent with its sub-contractors was fully capable of performing the contract.

Moreover, that part of Finding 5 quoted on page 14 of the majority opinion here as being adverse to respondent is refuted by the weight of the evidence below as reflected by respondent's requested findings (see pp. 4, 5 supra), and is in conflict with Findings Nos. 2, 3, 4 and parts of 5 and 8.

II.

AFTER THE CONTRACT WAS AWARDED IN FEBRUARY, 1942, A TERMINATION CLAUSE COULD NOT AND WOULD NOT HAVE BEEN INSERTED.

As respondent noted in its principal brief (pp. 23-35), the argument that a termination clause could and would have been inserted in the formal contract based upon the award of February 23, 1942, *was not raised by the Government until after the proof was closed below* and then by the Government's motion for a new trial.

In the petitioner's Supplemental Memorandum filed in this Court, it is admitted that

> *"The Government raises no question with regard to the Court of Claims' finding that the Navy's Notice of Award was validly issued, and created a binding agreement between the United States and respondent."* (pp. 2 and 3)

Never before has this Court, or any Court, to our knowledge, held that after a binding contract has been effected, either party could without the consent of the other and without any established statutory right, as is the case here, later require that the contract contain a clause to permit cancellation without damages to the party who breached the contract. Here the Government's position is far weaker, for the right to insert a termination clause later is attempted to be predicated upon the existence of an alleged administrative policy, no specific evidence of which has been introduced by the Government to the date of this petition.

The concurring Justices have stated that it was respondent's burden to show that the alleged termination policy said to have been effective in February, 1942, would not have covered the particular contract in question. Obviously, respondent did not and could not request finding of facts in the Court of Claims as to whether the United States had a right to cancel this contract or as to whether the particular contract was excepted from a generally existing right of cancellation, because the Government had not then asserted its alleged right to cancel. Respondent respectfully submits that a full exploration of all the available evidence of Naval contract termination policy as of February 1942, when this contract was awarded, would demonstrate that there is no evidence that there was an established and controlling policy at that time to require termination clauses in *all* contracts or in the contract here in question.

The type of issue here involved is beyond the historical application of the doctrine of judicial notice. In *Brown* v. *Piper*, 91 U. S. 37, 41-43, 23 L. ed. 200, 201, 202, the Court stated that:

> "'Courts will take notice of whatever is generally known within the limits of their jurisdiction . . . [but] this power is to be exercised by Courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative.'"

Similarly, in *Ohio Bell Telephone Co.* vs. *Public Utilities Commission*, 301 U. S. 292, 300-303, 81 L. ed. 1093, 1100, Mr. Justice Cardozo excoriated an administrative body for improper use of the doctrine of judicial notice, stating:

> "Courts take judicial notice of matters of common knowledge. 5 Wigmore, Evidence Secs. 2571, 2580, 2583; Thayer, Preliminary Treatise on Evidence, pp. 277, 302. They take judicial notice that there has been a depression, and that a decline of market values is one of its concomitants. Atchison, T. & S. F. R. Co. v. United States, Dayton Power & L. Co. v. Public Utilities Commission, and Central Kentucky Natural Gas Co. v. Railroad Commission, supra. How great the decline has been for this industry or that, for one material or another, in this year or the next, can be known only to the experts, who may even differ among themselves. For illustration, a court takes judicial notice of the fact that Confederate money depreciated in value during the War Between the States (Wood v. Cooper, 2 Heisk, 441, 447; Hix v. Hix, 26 W. Va. 481, 484, 485), but not of the extent of the depreciation at a given time and place. Modawell v. Holmes, 40 Ark. 391, 405. Cf. Feemster v. Ringo, 5 T. B. Mon. 336, 337; Baxter v. McDonnell, 155 N. Y. 83, 93, 49 N. E. 667, 40 L. R. A. 670. The distinction is the more important in cases where as here the extent of the fluctuations is not collaterally involved but is the very point in issue. Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of

the burden of resorting to the usual forms of evidence. Wigmore, Evidence, Sec. 2567; 1 Greenleaf, Evidence, 16th ed. p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' Ibid. Cf. Shapleigh v. Mier, 299 U. S. 468, ante, 355, 57 S. Ct. 261.

No rational concept of notoriety will include these variable elements. True, 'the category is not a closed one. 'The precedents of former judges, in declining to notice or assenting to notice specific facts, do not restrict the present judge from noticing a new fact, provided only that the new fact is notorious to the community.' 5 Wigmore, Evidence, Sec. 2583. Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case has been submitted, would be to turn the doctrine into a pretext for dispensing with a trial."

Petitioner, in raising the question of termination for the first time, in its motion for a new trial before the Court of Claims, stated (page 7):

"The same policy [Army termination procedure] was followed by the Navy, *although there is no evidence to show the exact date when the inclusion of such a termination article in Navy contracts became mandatory.* In view of the close cooperation between the two services in the handling of supply problems, it is reasonable to assume that Navy practice responded to that of the Army, and that by the first quarter of 1942, a termination article was a standard part of any procurement contract." (Emphasis supplied)

And even so recently as in its Supplemental Memorandum submitted to this Court, petitioner stated—

"It is impossible now to ascertain what the provisions of that definitive contract would have been, since they were to be determined by negotiation, and no such negotiation in fact took place. Especially at that time (Spring 1942) the contract provisions used by the war procuring agencies were in a flux and constantly

varied to meet newly-discovered problems or to cure working defects in existing forms." (Pages 5, 6)

In the *Navy's Directives as to General Procurement Policy*, and its amendments up to June 1, 1943, Dec. 28, 1941 (Q. W. 20 L43 (41122S)) PLD (MSH; Shf), stating what clauses were required by law, and otherwise, *a cancellation clause* is not included. And in the Attorney General's Memorandum in response to a letter dated November 29, 1943, from James E. Murray, Chairman of the Subcommittee, he stated—

> In the event of the termination of a contract that does not contain a termination clause, where the contractor does not agree to terminate and there is no exercise of the Government's power of eminent domain, and where the contractor is satisfactorily performing his part of the agreement at the time of termination, the Government's refusal to accept complete performance and to pay the agreed consideration in full would, in normal circumstances, constitute a breach of the contract for which the contractor would be entitled to recover damages. In such case, generally speaking, a court would attempt to give the contractor a judgment which would place him in the same financial position as if the contract had been fully performed.

From these statements it is clear that the Government itself is not able to state definitely when the policy of including termination clauses was generally effective and compulsory, so that certainly the Government cannot definitely state that on February 23, 1942, such a clause would have been required for the particular contract here. Since petitioner, and not respondent, has access to all Navy contracts executed during the period here involved, were there any contracts to support its contention they would have been produced before this Court or, more properly, before the Court of Claims. As a matter of fact, respondent has attached hereto as Appendix A, correspondence between the Chairman of the Ways and Means Committee, House of Representatives, and the Chief of the Bureau of Sup-

plies and Accounts, Navy Department, from which it is abundantly clear that the Navy cannot produce any evidence specifically demonstrating that in February, 1942, all contracts, including that such as is involved here, would have required a termination clause.

It seems indisputable that if it were common knowledge and a notorious fact that in February, 1942, termination clauses were required, this fact would have been known to the Government itself and would have led to the timely presentation of appropriate evidence. In the absence of such specific proof the matter is patently outside the scope of the doctrine of judicial notice. It might well be, as Mr. Justice Cardozo pointed out, that this Court could take judicial notice that some time during the late war a policy of inserting termination clauses was developed. But that is far different from taking judicial notice as to the *exact* time when such a policy was developed, and used, and the exact terms required by such a policy. The latter would appear to be a matter for specific proof and ordinary evidentiary examination.

Nor does the Forrestal statement of January 11, 1944, referred to by the concurring Justices, supply the gap. We do not question the above statement, as it covers the period from "late in 1941 to January 11, 1944", but the fact is that there were few if any contracts in 1941, and the spring of 1942 and later in 1942, which contained cancellation clauses, as such were not included then unless agreed to by the contractor and were not included in the Navy Directives issued December 28, 1941, as amended through June 1, 1943. So the term used by Mr. Forrestal, "Most contracts" covering the period from late 1941 to January 1944 does not indicate that cancellation clauses were used in most contracts in the early part of 1942, the period herein in question. In fact, such cancellation clauses were not used until late 1942, very few then, and 1943; and not made mandatory until February 28, 1944. (See our brief, page 26).

Apparently, the concurring Justices, in alluding to the Forrestal statement as an indication of Navy policy during the time in question, overlooked more detailed and forceful statements of other responsible officials. For example, on July 10, 1945, H. S. Hensel, stated in an affidavit made a part of the Transcript of Record in *Alexander Wool Combing Co. v. United States*, 334 U. S. 742 (referred to in the footnote of this Court's opinion, pages 2 and 8) that he was Chief of the Procurement Division of the Navy from July, 1941 to August, 1944, (R. 177), and that:

> "The Secretary's directive of December 28, 1941, established a new internal Navy procedure for clearing contracts negotiated under the War Powers Act; in addition it delegated to contracting officers complete discretion with respect to the form of such contracts, except for certain specified provisions required by statute or by executive order." (R. 223)
>
> "In 1941 and early 1942, I should judge that the great majority in dollar amount of fixed-price contracts provided escalation in some form or another * * * and * * * invariably also contained allowances for many contingencies not covered by escalation." (R. 189)
>
> "In general, Navy contractors in 1941 and early 1942 were including in their fixed price of estimated cost * * * allowances for almost all contingencies which could conceivably happen. * * *" (R. 190)
>
> "The contractor would not undertake the work without adequate protection and the Navy Department had no valid argument, in the light of the uncertainties as to costs facing the contractor, for rejecting allowances for the protection of the contractor. * * *" (R. 190)
>
> Navy Department must continue to rely upon the '*profit motive*' as an important factor in inducing war production. * * *" (R. 210)
>
> "After the passage of the War Powers Act performance and other bonds were largely dispensed with * * *"

"Navy Contract (except Bureau of Ships contracts) at this time (after the Procurement Legal Division was authorized to handle such matters in Aug. 1942) provided that in the event of cancellation for the convenience of the Government, the Navy would pay the contractor, * * *" (R. 227)

"After the First War Powers Act, the Navy dropped almost entirely the liquidated damage clause. * * * In addition, contractors were extremely reluctant to take contracts containing such clauses. As the Navy was interested in getting the goods themselves, and not money damages, it determined to omit this clause generally." (R. 227).

The Hensel affidavit patently demonstrates that (1) in February, 1942, contracts were entered into by negotiation and not by competitive bids; (2) at that time there was no standard form of Navy contract and contracting officers were delegated complete discretion as to the form of contracts except for certain specific provisions required by statute or executive order which, of course, did not include a termination clause; and (3) in general, contractors could demand and did receive the protective clauses they desired, and all objectionable clauses, such as cancellation clauses, requirement of bond, liquidated damage clause and termination clauses, were eliminated where the contractors objected in order to induce them to produce for the Navy. And that the same policy generally prevailed for the entire war production program is evident from the statement of the Attorney General quoted at pages 29-32 of our principal brief and also from statements of the Under Secretary of War, Robert P. Patterson, who had charge of all War Department procurement, which statement appears at pages 128 and 129 of the Transcript of Record in *Alexander Wool Combing Co. v. United States*, 334 U. S. 742.

III.

IN ACCORDANCE WITH THE ESTABLISHED POLICY OF THIS COURT, THIS CASE SHOULD BE REMANDED TO THE COURT OF CLAIMS FOR ADDITIONAL FINDINGS IN THE EVENT A REHEARING IS DEEMED INAPPROPRIATE.

Since the case of *United States v. Alonzo*, 9 Wall. 661, 19 L. ed. 808, this Court has consistently held that where there are insufficient findings, or the findings appear to conflict, the case should be remanded to the lower Court for additional findings and/or clarification of its existing findings.

Fidelity & Deposit Co. v. U. S., 259 U. S. 296;

U. S. v. Esnault-Peterie, 299 U. S. 202;

Marconi Wireless Teleg. Co. v. U. S., 320 U. S. 1, 48, 49;

Frank W. Mogal v. U. S., 323 U. S. 424.

See also *Fountain v. Filson*, 93 L. ed. 768, where this Court held that the reversal of a judgment and a remand on directions to enter judgment, where issues had been raised on which no evidence had ben adduced, improperly denied the losing party the right to meet an issue not tried.

There is no reason in this case to depart from this established policy of this Court, permitting clarification of findings below and particularly with respect to issues (the question of the right to cancel) upon which respondent has had no opportunity as yet to have a full evidentiary exploration. Moreover, for the reasons previously assigned, there is every reason to believe that the deficiencies noted in the majority and concurring opinions of this Court can be fully rectified, on an appropriate remand permitting clarification and additional findings by the Court of Claims.

Under Rule 33 of this Court, a rehearing may be granted where there are "substantial grounds available to peti-

tioner although not previously presented", citing the case of *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, 50.

CONCLUSION

Accordingly, respondent respectfully submits that even if this Court should deem a rehearing inappropriate, this case should be remanded to the Court of Claims with directions to make additional findings and to take additional testimony, if necessary, to resolve the issues raised by this Court.

By no other means can this Court have brought to its consideration all of the necessary facts for the establishment of the just rights of the parties.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Robert H. McNeill, attorney for respondent certifies that respondent's Petition For a Rehearing, or For Modification Of Judgment Remanding Case To Court of Claims For Additional Findings is presented in good faith and not for delay.

ROBERT H. MCNEILL
Attorney for Respondent

APPENDIX

PLAINTIFF'S EXCEPTIONS TO COMMISSIONER'S REPORT AND REQUEST FOR SPECIAL FINDINGS OF FACT. (IN COURT OF CLAIMS)

Finding 1.

No exception.

Finding 2.

The plaintiff requests that the following addition be made to this finding:

Inventories during January 1941 and April 1941 showed that plaintiff's plant consisted of a machine shop and foundry equipped with automatic screw machines and lathes up to a 14-foot boring mill, blacksmith shop, oven rooms, tool rooms, office buildings, etc., and included more equipment than was required to perform a contract to build gun mounts. (Tr. 5, 8, 69, 70, 203, 204—Plaintiff's Exhs. 1, 18.) The plant was located on approximately 6 acres of land and the buildings were made of brick and stone with metal roof and had undergone repairs and reconditioning, screening windows, installation of a "Navy-type" fence around the plant, etc. (Tr. 6, 191, 238.) The machinery and equipment in the plant were in good condition but required some checking, and the entire plant could have been put into operation in three weeks. (Tr. 8, 70, 72.)

Finding 3.

The plaintiff requests that the following addition be made to this finding:

During the year 1941, numerous inspections were made by Navy's representatives who informed plaintiff that they were satisfied with its plant and equipment. (Tr. 21, 181, 233, 235, 757.)

On August 2, 1941, plaintiff was informed by said Comdr. Uehlinger that he and his engineer would both approve plaintiff's proposal for the manufacture of gun mounts and that an award to that effect would be

made. (Tr. 23, 782.) As requested by the Gun Mount Section on August 23, 1941, plaintiff submitted additional information on September 9. (Tr. 23.) A conference was held on September 25, 1941, at the Navy Department, at which time plaintiff's representative was informed that the Navy was ready to place the order and the Navy submitted a written memorandum for additional information concerning its financial condition, proposed sub-contracts, machine tool study and proposed delivery schedule. (Tr. 24, 25, 767, 784—Plaintiff's Exh. 3.) The information requested by that memorandum was furnished by plaintiff on October 7, 1941, and included a copy of plaintiff's financial statement, machine tool study prepared by its chief engineer, list of all tools needed in the manufacturing of the gun mounts both "in the plant or immediately available", documentary evidence showing plaintiff's sources of supply of materials and commitments from the sub-contractors it proposed to utilize in performing a contract covering its proposal and a delivery schedule which provided for the first delivery to be made in February 1942. (Tr. 25, 201, 785—Plaintiff's Exh. 4.) Information as to sources of supply and sub-contractors were furnished to it by the Gun Mount Section. (Tr. 787-788.)

On November 28, 1941, BuOrd revised its plans and specifications for gun mounts upon which plaintiff's proposal (Plaintiff's Exh. 2) had been based, and requested plaintiff to revise its proposal accordingly. (Tr. 27, 202, 786, 787—Plaintiff's Exh. 16.) On December 13, 1941, plaintiff filed its amended proposal containing new prices as follows: (Tr. 27—Plaintiff's Exh. 5)

$12,600 for each complete unit on the basis of an award of 150 units, plus $550 per set of vessel spares
$ 5,500 per set of shore base spares
$ 1,650 per set of spares for tenders
$63,800 for tools, jugs, gauges and fixtures, and
$21,000 for patterns.

On December 18, 1941, an official negotiation conference was held at the Navy Department, attended by a number of representatives of both parties for the

purpose of final negotiation of the award. (Tr. 789-790.) At that meeting plaintiff's entire proposal (Plaintiff's Exh. 5) was reviewed by the Navy representatives and was accepted, and it was stated that it would not be necessary to issue a letter of intent because the contract would be issued promptly. (Tr. 29.) The proposal as accepted revealed that plaintiff was expected to sub-contract 45% of the work, although plaintiff intended doing all required machine shop work in its own plant. (Tr. 81, 94, 402—Defendant's Exh. 4.)

Everything was settled at that conference of December 18, except the matter of a bond. (Tr. 790-791.) At the end of that conference, and after Mr. Johnson and BuOrd's principal representative had left the meeting, an Ensign representing BuS and A asked Mr. Parse, plaintiff's Vice-President, whether "If the company were asked, would they be in a position to furnish a performance bond in an amount equal to 10% of the contract price?", and Mr. Parse answered in the affirmative. (Tr. 184, 185, 431.) The Navy representatives were surprised that plaintiff so readily agreed because it was thought plaintiff would request that the bond be waived. (Tr. 415.) The important thing to the Navy was not the bond itself but plaintiff's ability to get a bonding company to express a willingness to furnish a nominal bond, since such willingness would reflect whether plaintiff had financial ability. (Tr. 417, 418.) There was some mention that a bond signed by four individuals would also suffice. (Tr. 402, 434-435—Defendant's Exh. 4) but it was neither desired nor required that a bond or letter be furnished as a condition to the letter of intent or award issuing to the plaintiff on the terms negotiated. (Tr. 47, 297, 402, 431, 433.) Parse was also asked whether Navy financing would be requested and replied that the contract would be privately financed. (Tr. 184.)

On December 24, 1941, BuOrd notified the Naval Gun Factory that an award was being made to plaintiff for the manufacture of gun mounts and that certain technical plan data (Vandykes) should be furnished to the plaintiff to be used by it in the making of blue-

prints for its sub-contractors, etc. (Tr. 793, 795, 799—Plaintiff's Exh. 35.)

Finding 4

The plaintiff requests that the last three sentences of this Finding on page 32 be stricken, and that in lieu thereof the following addition be made:

On February 3, 1942, Mr. Johnson personally delivered to Comdr. Yoran a letter dated January 29, 1942, from the Maryland Casualty Co. addressed to the plaintiff, in which letter the bonding company stated it would furnish a $100,000 bond if the company changed its financial structure in either one of two alternative methods, and the second alternative provided that $200,000 of additional capital be invested in the company and that an item of $85,000 appearing on the balance sheet as an advance to stockholders be eliminated by the issuance of stock therefor to the creditor stockholders. (Tr. 35—Plaintiff's Exh. 7.) Upon delivery of the Maryland Casualty letter, Comdr. Yoran stated it was * acceptable and he immediately notified the award section that everything that had been asked for had been complied with and "told them to proceed with the award, and he sent me over to the award desk." (Tr. 36, 112, 470, 475, 477—Plaintiff's Exh. 32.) At no time was plaintiff requested either to furnish an actual bond or to recapitalize in accordance with the suggestion in the letter from Maryland Casualty Co. (Tr. 47-48, 297, 545, 546, 837-841—Plaintiff's Exh. 36) although plaintiff's officials were financially able and had expressed their willingness to comply with the aforesaid second alternative.

If a bond had been requested, the Navy form of bond would have been submitted to plaintiff as part of the printed form of contract, but no bond was ever requested. (Tr. 476-477, 488-489.) As of February 18, 1942, BuOrd had not been informed by BuSandA that plaintiff had submitted the surety's letter on February 3, 1942, and on February 18, 1942 BuOrd wrote an inter-office memorandum requesting BuSandA to no-

* Comdr. Yoran was not produced as a witness by defendant although it appeared he was still on duty in the Navy and stationed at the Charleston, S. C. Navy Yard.

tify plaintiff that the letter of intent would be cancelled unless a letter from surety was received by February 23, 1942. (Tr. 524—Plaintiff's Exh. 33.) BuSandA failed to give such notice to the plaintiff because the letter had in fact been filed with BuSandA on February 3, 1942. (Tr. 531.) At no time did BuSandA notify BuOrd that it had either received a letter from a surety company or that the letter was insufficient. (Tr. 528-529.) It was apparent that BuOrd did not know that the surety company's letter had been filed, and at that time either BuSandA had overlooked the fact that it had been filed; or, if it did not overlook its filing but considered it inadequate, it failed to give such notice to the plaintiff of any objection. (Tr. 544-546.)

Finding 5.

The plaintiff requests that there be stricken from this finding the last sentence on R. 32, and the remainder on R. 33, and in lieu thereof the following be added:

Plaintiff's facilities were adequate to perform the contract, but if any additional machinery was necessary, it could have been obtained by plaintiff, and financial arrangements had been made with the Federal Reserve Bank in Richmond if additional financing became necessary. (Tr. 221—Plaintiff's Exh. 19.) Plaintiff had prepared studies of machine tool operations and hours required, which were submitted to the Navy prior to the award. (Tr. 195-196—Plaintiff's Exh. 11.) Plaintiff had also furnished the Navy Department with copies of arrangements with sub-contractors relating to the work to be sublet after negotiations had been conducted with them. (Tr. 149, 187, 199—Plaintiff's Exh. 13.) As early as August 22, 1941, plaintiff had submitted a comprehensive plan for the production of gun mounts covering all phases of sub-contracting, machinery in the plant, engineering patterns, casting, assembly, etc., and those were considered by all to be adequate. (Tr. 174, 197, 138, 140—Plaintiff's Exh. 14.) Plaintiff had employed a very competent chief engineer, Mr. Kennedy, to handle the manufacture of gun mounts. (Tr. 129, 132.) He was

considered by Navy officials to be very able and "well qualified to perform the task". (Tr. 384, 385, 759-760, 780.) He prepared specifications based on the Navy's blueprints, tool and die design. (Tr. 136, 137.) There was an adequate labor supply of both skilled and unskilled labor immediately available in plaintiff's area and the contract to plaintiff was of general local interest. (Tr. 166, 172, 173, 177, 186, 241.) Plaintiff's facilities and the amount of sub-contracting (Tr. 141) plaintiff had arranged to use were such that the gun mounts called for by the cotnract could have been produced by plaintiff in accordance with plaintiff's proposal. (Tr. 155, 771.) See also facts set out in plaintiff's requested Finding No. 3 herein.

Finding 6.

The plaintiff requests that there be stricken from his finding on R. 33 the part as to the telegram of February 24, 1942, and that in lieu thereof the following be added:

> That official award was entitled "This is your official award of Navy contract Nos LL 96553", and stated that plaintiff's proposal theretofore submitted was accepted, that the contract price was $2,087,555 and instructed plaintiff to proceed with performance of the contract. (Tr. 41.)

Finding 7.

The plaintiff requests that the last two sentences be stricken from this Finding on R. 34, and in lieu thereof there be added the following:

> The evidence establishes that plaintiff could have successfully performed the contract and made a profit thereon as shown by plaintiff's request for a special finding under Number 5 above which is made a part hereof, and—
>
> Based upon costs and engineering manufacturing estimates computed from a study of machine tool operations and sub-contract prices, it appeared that if plaintiff had been permitted to perform the contract its profit would have amounted to 25% of the contract price of $2,087,000, or a gross profit of $500,000. (Tr.

146, 148, 149, 198. Plaintiff's Exh. 12) and this sum was subject to reduction by certain overhead expense items which would result in a net profit to the plaintiff of approximately 8% to 10% of the contract price, or a net profit between $167,000 and $208,000, for which plaintiff demands judgment. (Tr. 150-151.) * * *.

NAVY DEPARTMENT
BUREAU OF SUPPLIES AND ACCOUNTS
WASHINGTON, D. C.

22 June, 1949.

Honorable Robert L. Doughton
House of Representatives
Washington, D. C.

Dear Mr. Doughton:

Captain H. S. Covington, Navy Liaison Officer, has referred to me your letter dated June 10, 1949, pertaining to the request for information from Mr. R. H. McNeill, a Washington attorney. The latter appears to be concerned with the "fixed official practice of the Navy Department" during the spring of 1942, whereby a cancellation clause "may have been required to be inserted in some or all contracts entered into for war purposes."

In a letter from the Hon. James Forrestal, Acting Secretary of the Navy, October 10, 1943, Hearings before a Subcommittee on Contract Termination of the Senate Committee on Military Affairs on S. 1268, S. 1280 and S. J. Res. 80, 78th Congress, 1st Sess. 270-273 (1943) he said (p. 271):

> "The Navy Department commenced in the summer of 1941 the consideration of contract termination as it might affect procurement. At that time there were few actual terminations in contemplation. Contractors were, nevertheless, questioning the Government's right to terminate contracts and fair provisions permitting such termination without cause and defining the rights of the parties in such event were deemed necessary to facilitate the urgently needed procurement and to

minimize difficulties in the event of changing needs. A contract clause endeavoring to meet the procurement problem and safeguard the interests of both the Government and the contractors was then adopted and, except in respect of the ship construction contracts (a special problem), is in general form and substance in use in Navy contracts today."

In a memorandum submitted by Mr. Forrestal, dated January 11, 1944, it was stated that in the Navy,

> "Standard termination clauses for fixed price contracts were developed late in 1941, and in general form and substance have been inserted in most contracts entered into since that time except for ship-construction contracts, which constitute a separate problem. The Department has not undertaken to modify outstanding contracts by the insertiton of such clauses."

I do not believe that official Regulations, as such, were promulgated during the months of January, February and March, 1942, with reference to termination clauses, but I am of the opinion that this Department, along with the War Department, Maritime Commission, Treasury Department, and War Production Board, were at that time engaged in continuing study of the general subject, and that termination clauses were inserted in Navy contracts.

In accordance with your request, Mr. McNeill's letter dated June 9, 1949, is returned herewith.

Sincerely yours,

(sgd) C. W. Fox

E. D. FOSTER

Rear Admiral, SC, USN

Chief of Bureau

C. W. FOX

Rear Admiral, SC, US Navy

Deputy & Assistant Chief of Bureau